(4)

No. 90-1056



In The

# Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, Attorney General & Reporter for the State of Tennessee,

*Petitioner,*

v.

MARY REBECCA FREEMAN,

*Respondent.*

**On Writ Of Certiorari To The Tennessee Supreme Court**

## BRIEF OF PETITIONER

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## QUESTION PRESENTED FOR REVIEW

Does Tenn. Code Ann. § 2-7-111 (Supp. 1990), which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee, violate the Free Speech Clause of the First Amendment of the United States Constitution?

## LIST OF PARTIES

The parties in this case are Charles W. Burson, Attorney General & Reporter of the State of Tennessee, as petitioner and Rebecca Freeman as respondent.



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## BRIEF OF PETITIONER

## OPINIONS BELOW

The decision of the Tennessee Supreme Court is cited as *Freeman v. Burson,* 802 S.W.2d 210 (Tenn. 1990). The decision of the trial court is unpublished but is found in the Appendix to the Petition for Writ of Certiorari at 1a-6a.

## JURISDICTION

The judgment of the Tennessee Supreme Court was entered on October 1, 1990. (Petition for Writ of Certiorari, Appendix at 7a). The petition for writ of certiorari

was filed on December 28, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

## STATUTORY PROVISION INVOLVED

[Tenn. Code Ann.] § 2-7-111: **Posting of sample ballots and instructions – Arrangement of polling place – Restrictions.** – (a) The officer of elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed in conspicuous positions inside the polling place for the use of voters. The officer shall measure off one hundred feet (100') from the entrances to the building in which the election is to be held and place boundary signs at that distance. Provided, however, in any county having a population of:

| not less than | nor more than |
|---|---|
| 13,600 | 13,610 |
| 16,360 | 16,450 |
| 24,590 | 24,600 |
| 28,500 | 28,560 |
| 28,690 | 28,750 |
| 41,800 | 41,900 |
| 50,175 | 50,275 |
| 54,375 | 54,475 |
| 56,000 | 56,100 |
| 67,500 | 67,600 |
| 77,700 | 77,800 |
| 85,725 | 85,825 |

all according to the 1980 federal census or any subsequent federal census, the officer shall measure off three hundred feet (300') from the entrances to the building in which the election is to be held and place boundary signs at that distance.



(b) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

(c) The officer of elections shall have each official wear a badge with his name and official title.

(d) With the exception of counties having a metropolitan form of government, any county having a population over six hundred thousand (600,000) according to the 1970 federal census or any subsequent federal census, and counties having a population of between two hundred fifty thousand (250,000) and two hundred sixty thousand (260,000) by the 1970 census, any county may, by private act, extend the one hundred foot (100') boundary provided in this section. [Acts 1972, ch. 740, § 1; T.C.A. § 2-711; Acts 1980, ch. 543, §§ 1, 2, 1987, ch. 362, §§ 1, 2, 4.]

## STATEMENT OF THE CASE

### A.

### Facts Relevant To The Case

Since this case involves a facial challenge to the statute, the facts are sparse and undisputed. In the summer of 1987, the respondent, Rebecca Freeman, was campaign treasurer for the election of Tom Watson to the City

Council for Metropolitan Nashville-Davidson County, Tennessee. (Jt. App. at 3). Ms. Freeman received information to indicate that as a result of the issuance of an opinion by the Tennessee Attorney General on April 2, 1987, campaign workers would not be allowed to go onto the property of polling places to distribute campaign materials even beyond the 100 foot boundary set forth by Tenn. Code Ann. § 2-7-111 (Supp. 1990).[1] (Jt. App. at 5).

As a result of her misunderstanding as to the Tennessee Attorney General's interpretation of § 2-7-111, Ms. Freeman filed suit in Davidson County Chancery Court. (Jt. App. at 2-7). The focus of Ms. Freeman's challenge was two-fold: (1) the constitutionality of the prohibition of the display of campaign signs on polling place grounds, and (2) a challenge to the constitutionality of the 100 foot boundary. (Jt. App. at 5-6).

Only two witnesses testified at the trial on October 24, 1988, namely: Ms. Freeman and Constance Ann Alexander, the Registrar-at-Large for Metropolitan Nashville-Davidson County. As Registrar-at-Large, Ms. Alexander was responsible for conducting all elections in Davidson

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[1] The opinion of the Tennessee Attorney General of April 2, 1987 interpreted the phrase "on the grounds" in § 2-7-111(b) to mean "that campaign posters, signs or other campaign literature may not be displayed either within the 100-foot boundary or, in the event the property line of the building where the polling place is located extends beyond the 100-foot boundary, within the property line." Thus, Ms. Freeman could still under this interpretation electioneer 100 feet from the entrance to the polling place even if such a distance was within the grounds of the polling place. (Petition for Writ of Certiorari, Appendix at 3a-4a).



County. Prior to her appointment as Registrar-at-Large, Ms. Alexander served as Deputy Registrar-at-Large for approximately nine years. (Jt. App. at 33). The testimony of both witnesses focused upon the operation of the 100 foot boundary rule in the past and the possible effects of the elimination of the 100 foot boundary rule in future elections.

In the past, Ms. Alexander witnessed as many as ten or more campaign workers at particular polling places distributing campaign materials outside the 100 foot boundary on election day. (Jt. App. at 38-39). Furthermore, according to Ms. Alexander, individuals have been able to solicit votes and distribute campaign literature even where the 100 foot boundary went beyond the grounds of polling place.[2] Likewise, Ms. Freeman admitted that she had in fact distributed materials and solicited votes beyond the 100 foot boundary at elections in Tennessee over the past seventeen years. (Jt. App. at 18 and 29-30).

As for the distribution of material unrelated to the election such as commercial, charitable or religious solicitations, Ms. Alexander was unaware of any incident where either a private company or a religious denomination distributed literature or material at a polling place on

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[2] Ms. Freeman testified that at a particular polling place at a firehall on Gallatin Road in Nashville, the 100 foot boundary went to the other side of the Gallatin Road so there was "no place . . . to work that poll, and be able to reach voters." (Jt. App. at 24). However, Ms. Alexander testified that individuals are "able to solicit votes and distribute campaign literature outside the 100 foot boundary" at the Gallatin Road Firehall. (Jt. App. at 39).

election day in Nashville. (Jt. App. at 40). On the other hand, Ms. Freeman had a vague recollection of a single commercial solicitation occurring at a polling place in the past. (Jt. App. at 30). But, she could not recall any specifics with respect to that single incident and knew of no religious solicitations. (Jt. App. at 30).

As for the effect of abolishing the 100 foot boundary rule, it was the opinion of Ms. Alexander, as Registrar-at-Large, that there would be confusion and congestion at the polling places. (Jt. App. at 39-40). She indicated that at present, there are already a number of individuals located inside a polling place including voters, election officials, voting machine technicians and poll watchers.[3] If individuals are allowed to solicit votes in and around the polling place, it was the opinion of Ms. Alexander that there would be confusion and an increased possibility of errors made by election officials in the tabulation of votes. (Jt. App. at 46). Likewise, Ms. Alexander was concerned by potential congestion which would occur if campaign workers were allowed to solicit voters in and around the entrance to a polling place. (Jt. App. at 48). Although Tennessee has other statutes which impose criminal sanctions for intimidation of voters, it was Ms. Alexander's opinion that such statutes would not alleviate the confusion, congestion and possible errors which would be created by the abolition of the 100 foot boundary. (Jt. App. at 46-47).

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[3] According to Ms. Alexander, each candidate is entitled to have an individual at each polling place to watch the voting process to ensure its integrity; however, these individuals are not permitted to solicit votes. (Jt. App. at 40).



**B.**

**Reasoning Of The Lower Courts.**

The trial court held that: (1) the statute is content-neutral because "there is no reference to the content of the campaign materials to be displayed or distributed;" (2) the statute serves a compelling interest "with respect to the protection of voters and election officials from interference, harassment or intimidation during the voting process;" and (3) the statute provides alternate channels of communication for Ms. Freeman in that "she is free to distribute campaign materials and solicit voters 100 feet from the polling place." (Petition for Writ of Certiorari, Appendix at 5a-6a). Thus, the trial court concluded that the statute is a reasonable time, place and manner regulation. *Id.*

The Tennessee Supreme Court rejected the trial court's conclusion that § 2-7-111 is content-neutral. *Freeman*, 802 S.W.2d at 212. The Tennessee high court did conclude that the "State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself.*" *Id.* at 213. But, it also held that the "State has not shown a compelling interest in the 100-foot radius." *Id.* The Court did indicate that a 25 foot boundary might be a less restrictive means of accomplishing the State's interest and "might perhaps pass constitutional muster." *Id.* at 214.

## SUMMARY OF ARGUMENT

It is the position of the petitioner that when a state in conducting an election, establishes a politically neutral zone near the entrance to a polling place for a limited period of time in order to ensure the integrity of the election process and to protect the exercise of the right to vote, such a law is a reasonable time, place, and manner regulation. This Court has upheld such regulations against First Amendment challenges as long as the following three part test is met: (1) the regulation is content neutral; (2) the regulation is narrowly tailored to serve significant government interests; and (3) the regulation leaves open ample alternative channels of communication. *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

Tenn. Code Ann. § 2-7-111 is content-neutral because the justifications for the statute relate not to the content of the speech but to the following potential secondary effects created by such speech: (1) congestion and confusion for election officials at and around the polling place, and (2) delay and interference with voters as they seek to exercise their constitutional right to vote. Moreover, these justifications advance state interests of the highest order, namely: integrity of the election process and protection of the right to vote. This Court has indicated that preserving the integrity of the election process is of the highest order. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("preserving of the electoral process . . . [is an interest] of the highest importance"); *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1024 (1989) ("[a] State indisputably has a compelling interest in preserving the integrity of its election process"). Likewise, protection of an individual's right to



vote as he or she enters the polling place implicates one of the most basic rights in a democracy. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government").

Not only are these justifications unrelated to the content of the speech regulated, they are also both significant and even compelling state interests. Tenn. Code Ann. § 2-7-111 is narrowly tailored to further these state interests in two respects. First, the 100 foot boundary prevents confusion and congestion at and around the polling place which could increase the risk of errors in the tabulation of election results by election officials. Second, the statute ensures that citizens are able to exercise a fundamental right on a neutral site free of delay and interference. Tenn. Code Ann. § 2-7-111 also provides ample alternate channels of communication by permitting any "electioneering" to occur outside the 100 foot boundary.

Even if the 100 foot boundary law is measured against the higher standard of strict scrutiny, it still passes constitutional muster. The Tennessee Supreme Court agrees that the integrity of the election process is a compelling interest which supports the regulation. *Freeman*, 802 S.W.2d at 213. Moreover, the two alternatives suggested by the Tennessee Supreme Court to the 100 foot boundary are not lesser restrictive alternatives which can further the state's compelling interests. First, the laws which make intimidation of voters a crime are after-the-fact enforcement mechanisms which do not address the confusion, congestion and delay problems. Second,

reducing the boundary to 25 feet is a difference in degree not a less restrictive alternative in kind. *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (upheld $1000 limit on campaign contributions against charge it was too low and should be higher).

The land within the 100 foot boundary on election day is not a public forum. The test in determining whether such land is a public forum is "the location and purpose" of the government property. *U.S. v. Kokinda*, 110 S.Ct. 3115, 3121 (1990) (O'Connor, J., plurality). The sole purpose of the use of the land within the 100 foot boundary, including its sidewalks, is the conduct of elections. The fact that commercial and religious solicitation is not prohibited is irrelevant in light of the fact that such solicitations rarely if ever occur at polling places on election day. Since such land is a nonpublic forum, the standard for its consitutionality is one of reasonableness and § 2-7-111 meets that standard because of the governmental interests in preventing confusion, congestion, delay and interference in and around the polling place on election day.



## ARGUMENT

### I. TENN. CODE ANN. § 2-7-111 (SUPP. 1990), WHICH PROHIBITS THE DISTRIBUTION OF CAMPAIGN LITERATURE, DISPLAY OF CAMPAIGN MATERIALS OR THE SOLICITATION OF VOTES WITHIN 100 FEET TO THE ENTRANCE OF A POLLING PLACE ON ELECTION DAY, IS A REASONABLE TIME, PLACE, AND MANNER REGULATION.

#### A. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS CONTENT-NEUTRAL.

##### 1. A Statute Is Content-Neutral If The Justifications For The Statute Relate To The Secondary Effects Created By The Speech Not Its Content.

In order for a law regulating speech to be a reasonable time, place, and manner regulation, it must first be determined to be content-neutral.[4] The essence of the content-neutrality requirement has been described by this Court as "the need for absolute neutrality by government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67, *reh'g denied*, 428 U.S. 873 (1976). Thus, viewpoint-based regulations have been

[4] If a statute is determined to be content-based, then it is subjected to the highest level of scrutiny requiring a state to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

held to be content-based and subject to strict scrutiny. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (the First Amendment forbids government from regulating speech in ways to favor some viewpoints or ideas at the expense of others).

In *City of Renton v. Playtime Theatres*, 475 U.S. 41, *reh'g, denied*, 475 U.S. 1132 (1986), this Court applied the following definition of content-neutrality:

> In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech." [citations omitted] The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley, supra*, 408 U.S., at 95-96, 92 S.Ct., at 2289-2290. (emphasis in original)

*Id.* at 48-49.

The Renton City Council had enacted an ordinance prohibiting "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single– or multiple–family dwelling, church, or park, and within one mile of any school." *Id.* at 44. In addressing the issue of whether the ordinance was content-based because it treats theaters that specialize in adult films differently from other kinds of theaters, then Justice Rehnquist, writing for the majority stated the following:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community.



*Id.* at 47. Since the "predominate intent" of the ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts and the quality of urban life,' " the majority concluded that the ordinance was "completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech,' [citation omitted]" *Id.* at 48.[5]

Failing to acknowledge the full scope of the legal principles regarding content-neutrality and secondary effects, the Tennessee Supreme Court rejected the application of the "secondary effects" analysis to the present case on the grounds that the *City of Renton* opinion was

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[5] The Ninth Circuit in *Renton* held that if a "motivating factor" in the enactment of the ordinance was content-based, then it "would be invalid, apparently no matter how small a part his motivating factor may have played in the City Council's decision." *City of Renton*, 475 U.S. at 47. This Court rejected that argument citing *U.S. v. O'Brien*, 391 U.S. 367, 382-86 (1968) ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it").

limited to "businesses that purvey sexually explicit materials" and did not apply to statutes limiting political expression. *Freeman*, 802 S.W.2d at 212. However, in *Boos v. Barry*, 108 S.Ct. 1157 (1988), Justice O'Connor, writing an opinion joined by Justices Stevens and Scalia, did in fact apply the "secondary effects" analysis to an ordinance regulating political speech in Washington, D.C. which prohibited the "display [of] any flag, banner, placard or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative." *Id.* at 1161.

Although Justice O'Connor concluded that the ordinance was content-based, the opinion re-affirmed the validity of a "secondary effects" analysis by saying:

> Applying these principles to the case at hand leads readily to the conclusion that the display clause is content-based. The clause is justified *only* by reference to the content of speech. Respondents and the United States do not point to the "secondary effects" of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be content-based.

*Id.* at 1164.



In *Ward v. Rock Against Racism*, 109 S.Ct. 2746 (1989), this Court was confronted with a municipal noise regulation designed to ensure that music performances in a band shell owned by the City of New York did not disturb surrounding residents. In writing the opinion for the Court, Justice Kennedy cited the *City of Renton* case for the proposition that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 2754. Furthermore, the *Boos* decision was cited by Justice Kennedy for the proposition that "government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.' "

Finally, in *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990) this Court upheld a United States Postal Service ban on solicitation on postal premises. Justice O'Connor, writing for the plurality, said:

> Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another . . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.' " [citations omitted].

*Id.* at 3124-25. *See also U.S. v. Kokinda*, 110 S.Ct. at 3125-26 (Kennedy, J. concurring) ("the postal regulation meets the traditional standards we have applied to time, place, and manner restrictions of protected activity.")

In this case the regulation is subject matter-based and viewpoint-neutral. It only alters the time, place, or manner of the public debate of the subject area without favoring or opposing a particular viewpoint. Where a subject matter-based regulation is justified by content-neutral state interests of the highest order, there is no reason to fear governmental suppression of particular viewpoints, especially since there must be ample alternate channels of communication in order for the law to be a reasonable time, place, and manner regulation.[6]

While § 2-7-111 does regulate an entire subject area of speech, it is viewpoint-neutral in that it is not "sympathetic or hostile" to a particular viewpoint, i.e. solicitors for Democratic candidates and solicitors for Republican candidates are treated the same by being required to solicit votes and distribute campaign material more than 100 feet from the entrance to a polling place on election day. Moreover, the justification for the statute involves state interests of the highest order rather than discrimination against the content of certain types of speech.

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[6] "Although a majority of the Court has never expressly countenanced less demanding scrutiny for subject matter-based restrictions of speech, it is nevertheless possible, based on the Court's jurisprudence, to state a more affirmative case for the continued vitality of a distinction between subject matter-based and viewpoint-based restrictions on speech." Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1916 (1989).



**2. The Legislative History Of Tenn. Code Ann. § 2-7-111 (Supp. 1990) Supports The Conclusion That The Purposes Of The Statute Are To Remedy The Secondary Effects Of Confusion, Congestion, Delay and Interference Created By Electioneering At The Polling Place In Order to Further Important State Interests In Preserving The Integrity Of The Election Process And Protecting The Right To Vote.**

The legislative history of § 2-7-111 shows that the statute is one of a number of election related procedural safeguards enacted by the Tennessee General Assembly to preserve the integrity of the election process and protect the right to vote by remedying the secondary effects of confusion, congestion, delay and interference created by electioneering at the polling place. The predecessor of § 2-7-111 was enacted in 1967. While the legislative debates of the 1967 Act do not provide definitive statements as to the legislative intent or purpose of the 100 foot boundary, the enactment came at a time of electoral reform in this country.[7] The 1967 Act provided that

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[7] In determining the legislative purpose of a statute, this Court has considered the historical context of the statute. *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987). This statute was enacted two years after the Voting Rights Act of 1965 and five years after *Baker v. Carr*, 369 U.S. 186 (1962), the Tennessee case that ushered in a new era of electoral apportionment. In *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), this Court noted that when enacting the Voting Rights Act, "Congress had found that case-by-case litigation [to enforce voting rights] was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." Within the historical

(Continued on following page)

"[i]t shall be a misdemeanor to distribute campaign literature of any nature on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress." 1967 Tenn. Pub. Acts, ch. 85. (Appendix to this Brief, at 1a).

In 1970 the constitutionality of this statute was challenged in *Piper v. Swan*, 319 F.Supp. 908 (E.D. Tenn. 1970), *writ of mandamus denied*, 401 U.S. 971 (1971). Although the district court denied the plaintiff's application to convene a three judge panel under 28 U.S.C. §§ 2281 and 2284, it did note that the First Amendment was not absolute and that other state courts had approved similar regulations. Indeed, almost every state in the country has some form of "electioneering" regulation at polling places on election day.[8]

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context of efforts to safeguard the voting rights of all citizens, Chapter 85 can be viewed as part of the national effort to create an atmosphere within which fair and impartial elections could be conducted.

[8] The following 47 States have "electioneering" type regulations: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. (Petition For Writ of Certiorari, Appendix at 21a-50a. *See also* Note, *Defoliating the Grassroots: Election Day Restrictions on Free Speech*, 77 Geo. L.J. 2137 (1989).



In particular, the district court in *Piper* quoted with approval the following language from *Fish v. Redeker*, 2 Ariz. App. 602, 411 P.2d 40, 42 (1966):

> The purpose [of a statute creating a misdemeanor for electioneering within 150 feet of the polls] is to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters entering the polling place by political workers seeking a 'last chance' effort to change their vote.

*Piper*, 319 F.Supp. at 911.

The district court also cited the case of *State v. Black*, 54 N.J.L. 446, 24 A. 489 (1892) in which the New Jersey Supreme Court upheld a limitation on electioneering within 100 feet of a polling place. Specifically, the New Jersey court stated that "[t]he regulation is a proper one, to avoid disturbance and disorder immediately about the polls." *Id.*, 24 A. at 491.

Thus, judicial interpretation of the predecessor law to § 2-7-111 supports the conclusion that the purpose of the statute is to prevent delay or interference of the voters entering the polling place and avoid disturbance and disorder at the polls. These are the very justifications aimed at the secondary effects of speech which Justice O'Connor indicated in *Boos* were content-neutral. *Boos*, 108 S.Ct. at 1164 (congestion, interference with ingress or egress, visual clutter and embassy security).

In 1970, the Tennessee General Assembly directed the Tennessee Law Revision Commission to undertake a study of the election laws. S. J. Res. 92, 86th General Assembly, 2d Sess., 1970 Tenn. Pub. Acts 1061. The result

of the Commission's work was the adoption by the Tennessee General Assembly of the Election Code of 1972. *See* 1972 Tenn. Pub. Acts, ch. 740. The purpose of the new Election Code was to "regulate the conduct . . . so that: (a) [t]he freedom and purity of the ballot is secured [and] (d) [m]aximum participation by all citizens in the electoral process is encouraged." 1972 Tenn. Pub. Acts, ch. 740, § 102 [now codified as Tenn. Code Ann. § 2-1-102].

With respect to the "electioneering" statute, the Commission recommended the language that eventually became § 2-7-111. It was located in the seventh portion of the 1972 Act. *See* ch. 740, § 711. In addition to drafting the language of the Act, the Commission provided comments on the various portions. With respect to the seventh portion of the Act, the Commission's comment was that such provisions "should be liberally construed to provide for expeditious elections which are free of fraud and unnecessary burdens on voters." *See* An Elections Act Recommended to the 87th General Assembly by the Law Revision Commission with Section by Section Comments, 83 (1972) (Comments) (relevant portions included in the Appendix to this Brief at 7a.)[9]

The Commission's specific comments to the section setting forth the 100 foot boundary also indicate a

[9] Although these comments were not presented to the Tennessee Supreme Court in this case, this Court has taken judicial notice of a state statute's legislative history. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).



concern about making the polling place as "neutral" as reasonably possible:

> The present law prohibits electioneering within 100 feet, but it is not clear where the 100 feet is measured from. This section makes it clear that measurement is from the entrances to the building. This creates a 100 foot radius from each entrance which will be free of electioneering. This section also deals with a problem not clearly covered by the present law, the posting of signs on buildings and grounds where polling places are located. The goal is to make the site of polling places as neutral as is reasonably possible. The only legal way any kind of election materials may get into a polling place under this draft is as an aid to a voter who brings them in for himself.

*Id.* at 19a.

Additionally, the Commission also submitted a report to the Tennessee General Assembly, a portion of which sheds light on the purpose of the "electioneering" regulation which stated the following:

> *Numerous safeguards are included to preserve the purity of elections, such as* use of serially numbered ballots, use of duplicate registration records in all elections, attendance at polling place of poll watchers from various groups, *clarification of 100-foot boundary within which no campaign literature may be shown or distributed,* assistance by either a family member or election officials of different political parties in voting by the blind, physically disabled or illiterate, the channelling of all challenges through election judges, and the required state-wide use of voting machines with sanctions for non-compliance. [emphasis added].

Law Revision Commission of Tennessee, Special Report to the Eighty-Seventh General Assembly, 13 (January, 1972) (report included in the Appendix to this Brief at 55a).

The legislative history of § 2-7-111 provides a clear picture as to the two purposes of the statute. First, the 100 foot boundary is intended as a safeguard to secure "the freedom and purity of the ballot" by preventing the secondary effects of "disturbance and disorder immediately about the polls" which are created by electioneering at the polling place. *See* Tenn. Code Ann. § 2-1-102 (1985); *State v. Black*, 24 A. at 491. Second, the statute prevents another secondary effect caused by such electioneering of "delay" and "interference with the efficient handling of voters" by making the polling place as "neutral" as reasonably possible in order that voters may exercise their constitutional right to vote. *See Piper*, 319 F. Supp. at 911, quoting *Fish*, 411 P.2d at 42; Comments, Appendix at 19a.

In addition, it should also be noted that in Tennessee the legislature is presumed to know the interpretation which courts make of its enactments. *Hamby v. McDaniel*, 559 S.W.2d 774, 776 (Tenn. 1977). More to the point of this case is the following rule of construction: "the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, especially where the law is amended in other particulars or where the statute is reenacted without change in the part construed." *Id. See also Jones v. D. Canale & Co.*, 652 S.W.2d 336 (Tenn. 1983).



In *Piper*, the district court made clear its interpretation as to the purpose of the 1967 law through reference to similar "electioneering" laws in other states. This interpretation was not disturbed by the subsequent enactment in 1972. In fact, the 1972 law by expanding the regulation from distribution of campaign literature to include solicitation of votes and display of campaign material reaffirmed and clarified the purpose of the law to ensure the integrity of the election process and protect the rights of citizens to vote. These legislative purposes are content-neutral justifications.

### 3. The Operation Of Tenn. Code Ann. § 2-7-111 (Supp. 1990) Does In Fact Remedy The Secondary Effects Of Confusion, Congestion, Delay and Interference Created By Electioneering At The Polling Place So That Election Officials May Accurately Tally Votes and Voters May Exercise Their Constitutional Right To Vote.

The operation of Tenn. Code Ann. § 2-7-111 prevents the secondary effects of unnecessary congestion and confusion for election officials caused by electioneering at the polling place and furthers the state's interest in the integrity of the election process by ensuring an accurate calculation of the votes by election officials. The record reflects that polling places are already crowded with voters, election officials, election technicians and poll watchers. (Jt. App. at 48). The inclusion of zealous campaign workers in the polling place to solicit votes could result in incorrect tabulations of votes by the election officials, possibly tainting the election results. (Jt. App. at 39-40, 46). Just as the postal service found that "facility

managers were distracted from their primary jobs" by the competing demands of solicitors, *Kokinda*, 110 S.Ct. at 3124, poll officials could be distracted from their vote-related functions by demands of voter solicitors located in and around the polling place.

Furthermore, all too recently in our nation's history the polling places have been scenes of interference with the exercise of a basic right of American citizens. Only a few years before this statute was enacted, federal courts had to protect rural west Tennessee citizens seeking to exercise their right to vote. *U.S. v. Beaty*, 288 F.2d 653 (6th Cir. 1961) (injunction granted against landowners to prevent economic reprisals if sharecroppers registered and voted). The mere presence of campaign workers soliciting votes in close proximity to polling places could undermine the perception of a secret ballot and chill the exercise of voting rights.

The right to vote is one of the most basic constitutional rights at the foundation of democracy. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society.") Moreover, the state has an interest in encouraging maximum voter participation. Tenn. Code Ann. § 2-1-102(4). That interest is a compelling one. One way in which this fundamental right and this important state interest can be protected and advanced is by making polling places reasonably accessible in order for citizens to participate in government decision-making.

The secondary effects of congested polling places with crowds of campaign workers electioneering voters as they step into the voting booths would undoubtedly



create "havoc" (Jt. App. at 39-40) at the polling place. This disruption and interference by campaign workers does impinge in the minds of some voters on their privacy rights (Jt. App. at 40) and may in fact discourage some citizens from voting, a consequence which defeats the state's interest in encouraging maximum participation in voting. The 100 foot boundary eliminates these secondary effects and ensures that voters can exercise their constitutional right free from disruption and interference.

Both the legislative history and the practical operation of § 2-7-111 lead to the inescapable conclusion that the justifications for the statute are aimed at the secondary effects created by electioneering, not the content of any speech. Preventing disturbance and confusion around the polls for election officials and preventing delay and interference with voters are justifications which further state interests of the highest order unrelated to the content of speech, i.e. preserving integrity of the ballot and protecting the rights of voters.

### B. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS NARROWLY TAILORED TO SERVE SUBSTANTIAL STATE INTERESTS.

The second part of the Court's inquiry into whether § 2-7-111 is a reasonable time, place, and manner regulation is whether the statute is narrowly tailored to serve a substantial state interest. *City of Renton*, 475 U.S. at 47; *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2753 (1989); *U.S. v. Grace*, 461 U.S. 171, 177 (1983). Although, the interest need not be a compelling one, it is in this case.

More importantly, § 2-7-111 is narrowly tailored to serve substantial state interests.

As previously stated, this Court has found that the preservation of the integrity of the electoral process is an interest "of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) and "indisputably . . . compelling . . . " *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1024 (1989).[10] More specifically, in *Mills v. Alabama*, 384 U.S. 214, 218 (1966) this Court indicated that a state had the power "to regulate conduct in and around the polls in order to maintain peace, order and decorum there," although the extent of that power was not discussed.

Tennessee law also recognizes that the interests in the freedom and purity of the ballot and in encouraging citizens to exercise their constitutional right to vote are of the highest order. The Tennessee Constitution itself authorizes the General Assembly to enact laws "to secure the freedom of elections and the purity of the ballot box." Tenn. Const., art. IV, § 1 (1870). The Tennessee Supreme Court, in the context of upholding the Tennessee Campaign Financial Disclosure Act of 1980 against a challenge based on the First Amendment, indicated "[t]hat the

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[10] Lower federal courts have also recognized the importance of this interest. *See* e.g. *Clean-Up '84 v. Henrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) ("We recognize that the state has a significant interest in protecting the orderly functioning of the election process."); *National Broadcasting Co., Inc. v. Cleland*, 697 F.Supp. 1204, 1211 (N.D. Ga. 1988) ("the State's espoused interest in maintaining the sanctity and decorum of the polls and in encouraging the use of the franchise is a compelling one.")



State's interest is compelling is shown by the State's Constitutional provisions protecting the integrity and fairness of the election process." *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 904 (Tenn. 1987), *app. dismissed* 485 U.S. 930, *reh'g. denied* 485 U.S. 1029 (1988).

Tenn. Code Ann. § 2-7-111 is intended to and in fact does serve these very significant state interests. The purpose of Tennessee's Election Code is "to regulate the conduct of all elections by the people so that: (1) The freedom and purity of the ballot is secured [and] . . . (4) Maximum participation by all citizens in the electoral process is encouraged." Tenn. Code Ann. § 2-1-102(1) & (4) (1985). The Tennessee Supreme Court has recognized that "[t]he integrity of the ballot is jeopardized upon violation of any of the procedural safeguards that the Legislature has included in the election laws. . . . " *Emery v. Robertson County Election Comm'n*, 586 S.W.2d 103, 109 (Tenn. 1979).

Together § 2-1-102(1) and § 2-7-111 evince a concern for the voter as well as a concern for the integrity of the electoral process. In order to exercise his or her fundamental right to vote, the voter must go to a designated polling place on a designated day during designated hours. *See* Tenn. Code Ann. §§ 2-3-101 (Supp. 1990), 2-3-201-205 (1985). Voters are, there'ore, even more of a "captive audience" than the public transportation riders in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, this Court found that a city could refuse to accept political advertisements for the available advertising spaces on its public transportation system. The fact that the audience was a captive one clearly influenced the opinion. "The streetcar audience is a captive audience. It

is there as a matter of necessity, not of choice." *Id.*, at 302, quoting *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

While this Court has recognized that individuals are not captives everywhere, *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), it has recognized that unique circumstances may leave an individual with no ready means of avoiding unwanted speech. Because individuals may only vote at one location and within certain hours, voters walking into a polling entrance are truly captives. In the absence of some regulation on electioneering, their only options are to simply not exercise their constitutional right to vote or to face a crowd surrounding the entrance.

The record also shows that § 2-7-111 serves these state interests of highest importance. Ms. Alexander testified that an altercation between a voter and an intoxicated poll watcher has occurred at a polling place. (Jt. App. at 39). Absent the one hundred foot limit, there would be "total havoc." (Jt. App. at 39). People would be campaigning inside the polling place, (Jt. App. at 40, 46), inhibiting election officials' ability to conduct the election in the proper manner, (Jt. App. at 40, 46) and obstructing an accurate vote count. (Jt. App. at 46).

Finally, the regulation must be narrowly tailored. *Grace*, 461 U.S. at 177. The regulation, however, need not be the least restrictive means of serving the government's interests. *Ward*, 109 S.Ct. at 2757-58. The statute satisfies this standard. In fact, it is the narrow tailoring of the statute that caused the Tennessee Supreme Court to find the statute to be content based. *Freeman*, 802 S.W.2d at



213. The Court was concerned that the statute differentiated between political and non-political speech even though both would cause the same problem. *Id.*

The Tennessee Supreme Court's view is indistinguishable from the respondent's argument in *City of Renton* that the ordinance was underinclusive "in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theatres." *City of Renton*, 475 U.S. at 52. This Court rejected that contention. There was no evidence in the record that other businesses were engaged in or about to engage in similar practices:

> That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955).

*Id.* at 52-53.

Testimony at trial indicated that Ms. Alexander was not aware of any incidents of a private company or religious denomination distributing literature within the one hundred foot boundary on election day. (Jt. App. at 40). Ms. Freeman admitted that she had never seen a person hand out religious pamphlets or solicit money for a religious organization at a polling place. (Jt. App. at 30-31). Moreover, she had only a vague memory of seeing

a commercial solicitation on one occasion at a polling place. (Jt. App. at 30). There is absolutely no basis on this record to assume that the Tennessee General Assembly will not take appropriate action if nonpolitical solicitations should become a problem around polling places on election day.

It is evident from the record that § 2-7-111 deals with a problem, "electioneering" at polling places on election day, that is peculiar to one time, election day, and one type of place, polling places. Indeed, only small parcels of real estate for twelve hours a day, one to four days a year are involved. The statute is narrowly tailored to deal with the activity that is the source of the problem. The interests it serves, preserving the integrity of the election process and maximizing voter participation, are of the highest importance.

### C. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) LEAVES OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION.

The final part of the Court's inquiry into whether § 2-7-111 is a reasonable time, place, and manner regulation is whether the statute leaves open ample alternative channels of communication. *Ward*, 109 S.Ct. at 2760. The mere fact that a regulation may reduce the potential audience for an individual's speech "is of no consequence," when there is no showing that the remaining avenues of communication are inadequate. *Id.*

At trial, Ms. Freeman testified that the one hundred foot boundary in certain instances "would exclude part of [her] ability to reach or talk to some people." (Jt. App. at



24). Yet, Ms. Freeman admitted that she has solicited voters outside the 100 foot boundary at polling places for 17 years. (Jt. App. at 18 and 29-30). Apparently, she desires a last chance to influence every voter who casts his or her vote at a particular polling place.

Although "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention," *Kovacs v. Cooper*, 336 U.S. 77, 87, *reh'g denied* 336 U.S. 921 (1949) (Reed, J., plurality), campaign workers are not free from all regulations. In the *Kovacs* case, this Court upheld an ordinance banning the use of sound trucks on city streets or in public places. *Id.* at 89. Justice Reed wrote: "That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Id.* at 88-89. Implicit in this principle is the notion that there does not exist the right to solicit every single voter every day and everywhere.[11] All that is necessary is for a reasonable opportunity to exist to communicate with voters in general. Such an opportunity is present in this case.

Even where a voter may park a vehicle within the one hundred foot boundary, the voter may meet with campaign workers soliciting votes beyond that boundary.

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[11] In the *Piper* case, the district court rejected the plaintiff's contention that he "had an absolute right to speak to potential voters at any location." *Piper*, 319 F. Supp. at 910.

(Jt. App. at 42). Also, even where the entire grounds of the polling place are within the one hundred foot boundary, the record reflects that there have been no problems with people campaigning beyond the boundary. (Jt. App. at 42). The trial court found that Ms. Freeman had "alternate channels to exercise her speech." (Petition for Writ of Certiorari, Appendix at 6a). Since the statute was found to be content-based this finding was not addressed by the Tennessee Supreme Court.

Just as in *City of Renton*, where this Court held the First Amendment required "only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, . . . " *City of Renton*, 475 U.S. at 54, it is perfectly clear that campaign workers who wish to solicit votes have ample channels in which to exercise that right. Indeed this Court found 520 acres or five percent of the City of Renton's land available for adult theaters was an ample alternate channel of communication. *Id.* at 53-54. Here, Ms. Freeman has 562 square miles of Davidson County except the 100 foot radius of entrances to the 164 polling places to solicit votes on election day.

## II. TENN. CODE ANN. § 2-7-111 (SUPP. 1990) IS THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING THE STATE'S COMPELLING INTERESTS IN PRESERVING THE INTEGRITY OF THE BALLOT AND PROTECTING THE RIGHTS OF VOTERS.

Even if this Court measures the 100 foot boundary law against the higher standard of strict scrutiny, § 2-7-111 still passes constitutional muster. It cannot be



disputed that the statute is designed to serve the compelling state interests of preserving the integrity of the ballot and protecting the rights of the voters. Even the Tennessee Supreme Court agreed that the "State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself.*" *Freeman*, 802 S.W.2d at 213 (emphasis supplied in original). *See also Bellotti*, 435 U.S. at 788-89 (preserving integrity of electoral process of "highest importance"); *Eu*, 109 S.Ct. at 1024 (such an interest is "indisputably compelling").

Although such compelling interests were acknowledged, the Tennessee Supreme Court erroneously concluded that the 100 foot boundary was not the least restrictive means of accomplishing those interests. In particular, the Tennessee high court pointed to two alternatives which it considered less intrusive on free speech while still advancing the state's compelling interests: (1) criminal laws in Tennessee prohibiting voter interference or intimidation[12] adequately serve the state's interests,

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[12] Tenn. Code Ann. § 2-19-115 (1985) makes it a misdemeanor for any person: "(1) By force or threats to prevent or endeavor to prevent any elector from voting at any primary or final election; (2) To make use of any violence, force or restraint, or to inflict or threaten the infliction of any injury, damage, harm or loss; Or (3) In any manner to practice intimidation upon or against any person in order to induce or compel him to vote or refrain from voting, to vote or refrain from voting for any particular person or measure, or on account of such person having voted or refrained from voting in any such election."

*Freeman*, 802 S.W.2d at 214; or (2) a 25 foot boundary line "might pass constitutional muster." *Id.*

The following testimony of Ms. Alexander refutes the assertion that criminal laws prohibiting voter interference or intimidation adequately serve the state's interest:

> Q. Do you think that those [intimidation and interference] statutes would be sufficient to take care of the problems that would be created by the chaos and confusion that you said would occur?
>
> A. No, I do not. It would take care of a portion of it, and that is the intimidation and interference. But as far as the poll officials being able to operate under the manner that they should, and get the vote count in the manner in which they should, or conduct the election in the manner in which they should, I do not feel that it would be – that it would cover that.

(Jt. App. at 46). Moreover, just as the existence of bribery laws did not mean that campaign funds limits were not needed in *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976), the existence of penalties for some conduct such as intimidation and interference with voters does not make other regulations such as the 100 foot boundary unnecessary.

Additionally, the interference and intimidation laws are after-the-fact enforcement mechanisms. *See* Tenn. Code Ann. § 2-7-103(c) (1985) (no policeman or law enforcement officer may come within 10 feet of the entrance of a polling place except upon request of an election official to make an arrest or to vote). The Tennessee Supreme Court's view that the state's interest is nothing more than protecting voters from "annoying



campaign workers armed with cheap ball point pens and fingernail files embossed with a candidate's name," *Freeman*, 802 S.W.2d at 214, ignores the reality that during heated elections violence can occur, i.e. altercations between voters and intoxicated poll watchers. (Jt. App. at 39). Furthermore, the State of Tennessee is not constitutionally required to wait until intimidation of or interference with a voter occurs at a polling place to protect against such occurrences. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("[l]egislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.")

Likewise, the reduction of the 100 foot boundary to 25 feet is not a less restrictive alternative because it is a difference in degree not kind. In *Buckley*, this Court refused to hold a $1,000 limit on campaign contributions was too low stating:

> A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has

> no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 171 U.S.App.D.C., at 193, 519 F.2d, at 842. Such distinctions in degree become significant only when they can be said to amount to differences in kind.

*Buckley*, 424 U.S. at 30. The fallacy of reducing the 100 foot boundary to 25 feet is best summarized by Justice Fones in his dissent:

> The majority says that somewhere in the space of 75 feet a ban on vote solicitation becomes unconstitutional. It takes approximately 15 seconds to walk 75 feet. If the electorate of Tennessee is dependent upon the free speech available in the last 15 seconds before they enter the polling place, to cast an informed ballot, God help us.

*Freeman*, 802 S.W.2d at 215.

## III. SINCE THE LAND WITHIN THE 100 FOOT BOUNDARY ON ELECTION DAY IS NOT A PUBLIC FORUM, TENN. CODE ANN. § 2-7-111 (SUPP. 1990) SHOULD BE UPHELD AS A REASONABLE REGULATION.

The area within the 100 foot boundary on election day is not a public forum; therefore, § 2-7-111 should be upheld as a reasonable regulation. In *Kokinda*, Justice O'Connor, in a plurality opinion, set forth the following tripartite framework for determining how First Amendment interests are to be analyzed with respect to government property:

> Regulation of speech activity on government property that has been traditionally open to the public for expressive activity, such as



> public streets and parks is examined under strict scrutiny. [citation omitted] Regulation of speech on property that government has expressly dedicated to speech activity is also examined under strict scrutiny. [citation omitted] But regulation of speech activity where the government has not dedicated its property to First Amendment activity is examined only for reasonableness.

*Kokinda*, 110 S.Ct. at 3119-20 (O'Connor, J., plurality). *See also Perry Education Assn.*, 460 U.S. at 45-46. In determining whether a publicly-owned sidewalk constitutes a public forum, the critical issue is "the location and purpose of the sidewalk . . . . " *Id.* at 3121. *See also United States v. Grace*, 461 U.S. at 179-80.

Polling places in Tennessee are designated by the county election commissions with each polling place to be in the election precinct it is to serve. Tenn. Code Ann. § 2-3-101 (Supp. 1990). Thus, as a practical matter, polling places and their surrounding grounds can vary in location from government property such as public schools and other government buildings to private property such as churches or private businesses. *See* Tenn. Code Ann. § 2-3-107(b)(1)(c)(1985) (county election commissions are encouraged to use public buildings, but may use private buildings when public buildings are unavailable).

The sole purpose of the use of a polling place and its surrounding grounds on election day is to conduct an election. As in *Kokinda*, the State "has not expressly dedicated its sidewalks to any expressive activity . . . " on election day. *Kokinda*, 110 S.Ct. at 3121. In fact, § 2-7-111 provides that "[t]he officer shall measure off 100 feet from the entrances to the building in which the election is to be held and place boundary signs at that distance." Thus,

election officials are explicitly directed to mark the land 100 feet from the entrance to the polling place as prohibiting electioneering. Just as postal patrons walking on the sidewalk leading to a post office are there to transact business only, persons entering the clearly marked 100 foot boundary on election day are there only to vote. Thus, the land within the 100 foot boundary of a polling place is not a public forum on election day.

The fact that commercial and religious solicitations are not prohibited by § 2-7-111 does not mean that polling place grounds are converted into a public forum. In *Kokinda*, Justice O'Connor rejected the defendant's argument that the Postal Service's permitting certain types of speech rendered the property a public forum stating that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities." *Id*. In this case, religious and charitable speech are not explicitly permitted by the statute, rather such activity is neither permitted nor prohibited because it rarely if ever occurs. (Jt. App. at 30, 40). The State of Tennessee has not expressly dedicated land within 100 feet of a polling place on election day as a public forum. In fact, § 2-7-111 does just the opposite by dedicating such land to be free of electioneering while at the same time establishing a public forum outside the 100 foot boundary for political campaign solicitors.

Once it is established that the land within the 100 foot boundary of a polling place is a non-public forum, there can be little doubt that the regulation is reasonable. As previously argued in this brief, the purpose and effect of the 100 foot boundary is to ensure the integrity of the election process and protect citizens about to exercise



their right to vote. Both of these goals are furthered by the 100 foot boundary in its prevention of confusion, congestion, delay, and intimidation in and around the polling place on election day.

## CONCLUSION

Based upon the foregoing authorities and analysis, the petitioner asks this Court to reverse the decision of the Tennessee Supreme Court and hold that § 2-7-111 does not violate the Free Speech Clause of the First Amendment because it is a reasonable time, place, and manner regulation.

Respectfully submitted,

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# APPENDIX

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**CHAPTER NO. 85**

**HOUSE BILL NO. 23**

**(By Bragg, Stanley)**

SUBSTITUTED FOR: SENATE BILL No. 26

(By Crouch, Pipkin, Ray, Motlow)

AN ACT to amend Section 2-1218, Tennessee Code Annotated, to prohibit distribution of campaign literature in the building where an election is in progress.

*Be it enacted by the General Assembly of the State of Tennessee:*

SECTION 1. Section 2-1218, Tennessee Code Annotated, is amended by adding the following at the end of said Section: "It shall be a misdemeanor to distribute campaign literature of any nature on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress."

SECTION 2. This Act shall take effect September 1, 1967.

Passed: April 13, 1967.

JAMES H. CUMMINGS,
*Speaker of the House of Representatives.*

FRANK C. GORRELL,
*Speaker of the Senate.*

Approved: April 19, 1967.

BUFORD ELLINGTON,
*Governor.*

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# AN ELECTIONS ACT
# RECOMMENDED TO THE
# EIGHTY-SEVENTH GENERAL ASSEMBLY
# BY THE LAW REVISION COMMISSION
# WITH SECTION-BY-SECTION COMMENTS

LAW REVISION COMMISSION
STATE OF TENNESSEE
1105 SUDEKUM BUILDING
NASHVILLE, TENNESSEE 37219

Grayfred B. Gray
Executive Director
January, 1972



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## The Elections Act
## SECTION INDEX

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SECTIONAL INDEX TO SECTION 1 CHAPTERS

* * *

CHAPTER 7. PROCEDURE AT THE POLLING PLACE

GENERAL RIGHTS AND DUTIES





OPENING THE POLLS



THE VOTING PROCESS

DUTIES AFTER CLOSING POLLS



* * *



## [p. 83] CHAPTER 7. PROCEDURE AT THE POLLING PLACE

This Chapter is a comprehensive statement of rights and duties at polling places. With minor exceptions, it sets forth the duties of all election officials at the polling place.

It is written in the light of the titles for the various election officials set forth in Chapter 4. Each office is distinct both in name and in responsibilities.

Consistent with the thrust of the entire revision, it provides the procedure for all kinds of elections and regardless of whether voting machines are used or not. It should be liberally construed to provide for expeditious elections which are free of fraud and unnecessary burdens on voters.

This Chapter is organized in several parts for ease of use. They are:

GENERAL RIGHTS AND DUTIES
OPENING THE POLLS
THE VOTING PROCESS
DUTIES AFTER CLOSING THE POLLS

### GENERAL RIGHTS AND DUTIES

701. The Officer of Elections is in charge of and responsible for the conduct of all the elections being held at the polling place where he is the Officer of Elections. He is subject to the direction of the County Election Commission in the performance of his duties.

The Officer of Elections shall:

(a) Maintain order at the polling place;

(b) Assure that voting machines and voting compartments are arranged in such a way that the secrecy of the ballot is preserved and that no voter, on entering the polling place, comes near the voting machines or ballot boxes before his eligibility to vote has been determined;

(c) Keep each voting compartment provided with proper supplies for marking the ballots;

(d) Have persons who are waiting to vote stand in line so that no person who is waiting is standing nearer than ten (10) feet to any voting machine or ballot box;

(e) Report the breakdown of any voting machine to the machine custodian; and

[p. 84] (f) Insure that each other election official performs his duties.

Derivation

T.C.A. 2-1217, 1218, and 1534.

Comment

This section establishes the Officer of Elections as the single election official who is responsible for the conduct of elections, primary and general, at his polling place. Contrary to much current practice, however, he is made squarely answerable to the County Election Commission at all times.

702. During the time for voting the judges shall distribute paper ballots, decide challenges to voters, serve in place of other election officials as directed by the Officer of Elections, and assist the Officer of Elections in such ways as he may direct.



Derivation

T.C.A. 2-814 and 1518.

Comment

This section broadens the role of judge into that of assistant of the Officer of Elections while preserving certain distinct roles for judges, individually or jointly. The present law's use of judges as machine operators is rejected except to the extent that the Officer may direct a judge to substitute for a machine operator. The judges have the responsibility for paper ballots and deciding challenges, leaving the Officer free to perform his broader duties.

703. No person may be admitted to a polling place while the procedures required by this Chapter are being carried out except election officials, voters, persons properly assisting voters, the press, poll watchers appointed under section 704 and others bearing written authorization from the County Election Commission. Candidates may be present after the polls close. No policeman or other law enforcement officer may come nearer to the entrance to a polling place than ten (10) feet or enter the polling place except at the request of the Officer of Elections or the County Election Commission or to make an arrest or to vote.

No person may go into a voting machine or a voting booth while it is occupied by a voter except as expressly authorized by this title.

Derivation

T.C.A. 2-1217, 1223, 1224, 1520, 1533, and 2206.

Comment

A chronic problem at the polls appears to be the presence of people who need not be there. This creates

confusion and opportunity for misconduct. Therefore this section bars people from being inside polling places except for those people who have a [p. 85] reason to be there. Candidates are barred because it is impractical to ask that they not campaign if they are let in.

To protect the secrecy of the ballot people are barred from entering voting machines or booths while they are occupied.

704. (a) Each political party and any organization of citizens interested in a question on the ballot or interested in preserving the purity of elections and in guarding against abuse of the elective franchise may appoint poll watchers. The County Election Commission may require organizations to produce evidence that they are entitled to appoint watchers. Each candidate in primary elections and each independent candidate in general elections may appoint one (1) poll watcher for each polling place. All appointments of watchers shall be in writing and signed by the persons or organizations authorized to make the appointment. A citizens' organization shall submit a list of the names of its poll watchers to the County Election Commission no later than noon of the day before the election.

(b) Each political party which has candidates in the election and each citizens' organization may have two (2) watchers at each polling place. One of the watchers representing a party may be appointed by the Chairman of the County Executive Committee of the party and the other by a majority of the candidates of that party running exclusively within the county in which the watchers are appointed. If the candidates of a party fail to appoint the watchers by noon on the third day before the election, the



Chairman of the County Executive Committee of the party may appoint both watchers representing his party.

(c) Upon arrival at the polling place a watcher shall display his appointment to the Officer of Elections and sign the register of watchers. Poll watchers may be present during all proceedings at the polling place governed by this Chapter. They may watch and inspect the performance in and around the polling place of all duties under this Title. A watcher may, through the judges, challenge any person who offers to vote in the election. A watcher may also inspect all ballots while being called and counted and all tally sheets and poll lists during preparation and certification.

[p. 86] If a poll watcher wishes to protest any aspect of the conduct of the election, he shall present his protest to the Officer of Elections or to the County Election Commission or an inspector. The Officer of Elections or County Election Commission shall rule promptly upon the presentation of any protest and take any necessary corrective action.

(d) No watcher may interfere with any voter in the preparation or casting of his ballot or prevent the election officials' performance of their duties. No watcher may observe the giving of assistance in voting to a voter who is entitled to assistance. Watchers shall wear poll watcher badges with their names and their organization's name but no campaign material advocating voting for candidates or positions on questions.

Derivation

T.C.A. 2-817 and 1110.

Cross-References

Challenge procedure, see §§723-726
Electioneering, see §711.

Comment

This section adds to the traditional poll watchers representing parties and candidates by authorizing other organizations to have watchers. This is provided for consistency in non-partisan elections and elections on questions as well as to reach for all elections such organizations as the League of Women Voters which have an interest in the purity of elections.

Subsection (c) clarifies the procedures for and rights of poll watchers, including their right to be present from the arrival of election officials to their departure after performing their duties. Since their presence is to assure confidence in the fairness of the elections and to preserve grounds of contest, they are free to observe and to inspect the performance of the election officials' duties. To do this they are free to go about in the polling place.

Subsection (c) squarely directs poll watchers to present their complaints to the Officer of Elections instead of getting into disputes with the other officials. If the watcher wishes, he can present his complaint to the Commission directly or to an inspector if one is present.

Watchers are subject to several limitations set out in sub-section (d). In particular they are not to interfere with voters. Thus, while they may challenge voters, this must be done entirely through the judges. They may not interfere with the election officials' performance of their duties in such a way as to prevent the performance. Some minimal interference is, of course, inherent in close observation.

Consistent with section 711 which is intended to keep electioneering activity away from the polling place, the



watchers are barred from wearing things such as buttons or hats which are campaign material. To identify them to voters who may have some complaint they wear a badge naming their party or other organization. The effect of this section and section 711 is to bar all campaign activities or candidate identification from the immediate vicinity of the polling place except that voters are not barred from bringing in campaign materials which they may want to use to assist them in casting their votes.

[p. 87] OPENING THE POLLS

705. The election officials of each polling place shall meet at the polling place at least one-half (1/2) hour before the time for opening the polls for the election.

If any election official fails to appear at the polling place, the Officer of Elections or, in his absence, a majority of the election officials attending shall select other persons to fill the vacancies. The persons selected shall be registered voters at the polling place for which they are to serve. Any person selected to fill a vacancy shall be, to the extent practicable, of the same political party as the person in whose place he was selected. The Officer of Elections or, in his absence, the oldest election official in age who has taken the oath shall administer the oath of section 112 to the persons filling vacancies and to any other official who has not taken the oath. The Officer of Elections shall notify the County Election Commission of all vacancies. Persons appointed to vacancies shall be compensated at the same rate as others preforming the job to which they are appointed.

Derivation

T.C.A. 2-809, 1101, 1102, 1104, 1105, and 1216.

Comment

This is substantially the present law. Consistent with broadening the Officer of Elections' responsibilities, he is to choose replacements under the limitations imposed by the section.

706. If the County Election Commission receives notice that no election officials are at the polling place, the Commission shall promptly appoint new officials who shall conduct the election. Until the polling place is open for voting, any voter who is eligible to vote there may vote at the County Election Commission office; ballots cast under this sentence shall be counted by the County Election Commission.

Derivation

T.C.A. 2-809, 1103 and 1229.

Comment

The failure of all election officials to serve is rare, but the present law does cover it. T.C.A. 2-1229 makes the Chairman of the County Election Commission responsible for holding the election if the Officer of Elections does not arrive. If no election official arrives, a Justice of the Peace or three property owners may appoint officials or the property owners may conduct the election under [p. 88] T.C.A. 2-1103. For primaries the voters appoint officials under T.C.A. 2-809. All of these are highly impractical. The Chairman has other things to do. The voters, if no officials arrive, have neither registration books nor ballots nor voting machine keys.

This draft places the responsibility on the County Election Commission to immediately re-staff the polling place. To avoid the possibility of depriving the voters of time to vote, the voters are authorized to vote at the County Election Commission office until the polling place is in operation. The commission office contains everything necessary to conduct the election.



707. The Officer of Elections shall deliver to the polling place on the day of the election the duplicate permanent registration records, paper ballots, sample ballots, voting machine keys, ballot boxes and keys, and all other supplies needed for the conduct of the election.

Derivation

T.C.A. 2-315, 814, 1214, and 1515

Comment

This section transfers to the Officer of Elections the responsibility for delivering all the materials necessary for the election. Under present law they are the responsibility of officers, judges and registrars. The practice varies from county to county.

708. (a) If the ballots for a polling place are lost, stolen or destroyed or are not delivered to the polling place or the supply of paper ballots is insufficient for any reason, the Officer of Elections shall notify the County Election Commission immediately after learning of this fact. The Commission shall provide replacements for the missing or destroyed ballots by delivering the ballots reserved under section 515 and by having such additional ballots prepared as may be necessary.

(b) If paper ballots or voting machines or both are delivered to the wrong polling place, the Officer of Elections shall notify the County Election Commission upon discovery of the error. The Commission shall immediately have the proper ballots or voting machines delivered. Pending the arrival of the correct voting machines, the Officer of Elections shall proceed under section 719 as if the machines were out of order.

(c) At the close of the polls the Officer of Elections shall make a written report of the circumstances causing his action under this section to the County Election Commission [p. 89] which may make additions to the report and shall then transmit it to the grand jury of the county.

Derivation

T.C.A. 2-1215 and 1521.

Comment

Present law requires the registrars at a polling place to make up paper ballots to replace stolen, destroyed or undelivered ballots. The judges replace ballot labels on voting machines. Subsection (a) places this responsibility on the County Election Commission and requires the use of ballots which the Commission holds in reserve under this draft. This avoids the dangers of on the spot ballot making.

Subsection (b) is new, but it merely authorizes the use of that common sense calls for. The use of paper ballots pending the arrival of voting machines is new and is intended to avoid having to require voters either to wait for long times or to return to the polling place later in the day.

The loss or destruction of ballots is a serious matter which may raise questions of misconduct. Therefore, a written report and grand jury consideration are required.

709. The Officer of Elections shall show the ballot box to the judges who shall verify that it is empty, and the Officer shall then lock the ballot box before the polling place is open for voting. The ballot box shall remain locked until the votes are to be counted after voting has ended.

Derivation

T.C.A. 2-1305.



Comment

The requirement of examination of the ballot boxes by the judges is new.

710. (a) The Officer shall give the sealed voting machine keys to the judges to prepare the machines for voting. The envelope containing the keys may not be opened until the judges have examined it to see that it has not been opened and that the number registered on the protective counter and the number on the seal with which the machine is sealed correspond with the numbers written on the envelope containing the keys.

(b) If the envelope has been torn open, or if the numbers do not correspond, or if any other discrepancy is found, the judges shall immediately inform the voting machine custodian of the facts. The custodian or his assistant shall promptly examine the machine and certify whether it is properly arranged.

[p. 90] (c) If the number on the seal and the protective counter are found to agree with the numbers on the envelope, the judges shall then open the door concealing the counters and carefully examine every counter to see that it registers zero (000) and shall also allow the watchers to examine them. The judges shall then sign a certificate showing the delivery of the keys in a sealed envelope, the number on the seal, the number registered on the protective counter, that all the counters are set at zero (000), and that the ballot labels are properly placed in the machine.

(d) If any counter is found not to register at zero (000) and if it is impracticable for the custodian to arrive in time to adjust the counters before the time set for

opening the polls, the judges shall immediately make a written statement of the designating letter and number, if any, of such counter together with the number registered thereon and shall sign and post the statement on the wall of the polling place where it shall remain throughout the election day. In filling out the tally sheets they shall subtract such number from the number then registered on such counter.

Derivation

T.C.A. 2-1517.

Comment

Other than changes as to which officials do certain things this section is the same as the present law.

711. The Officer of Elections shall have the sample ballots, voting instructions, and other materials which are to be posted placed in conspicuous positions inside the polling place for the use of voters. The Officer shall measure off 100 feet from the entrances to the building in which the election is to be held and place boundary signs at that distance.

Within the 100 foot boundary and the building in which the polling place is located display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a [p. 91] polling place is located. The Officer of Elections shall have each official wear a badge with his name and official title.



Derivation

T.C.A. 2-1218 and 1516.

Cross-References

Arrangement of polling place, see §313.

Comment

This section imposes on the Officer of Elections the general responsibility for posting materials in the polling place. The posting of boundary signs for electioneering is new. This is a chronic problem for both election officials and campaign workers.

The present law prohibits electioneering with 100 feet, but it is not clear what the 100 feet is measured from. This section makes it clear that measurement is from the entrances to the building. This creates a 100 foot radius from each entrance which will be free of electioneering. This section also deals with a problem not clearly covered by the present law, the posting of signs on buildings and grounds where polling places are located. The goal is to make the site of polling places as neutral as is reasonably possible. The only legal way any kind of election materials may get into a polling place under this draft is as an aid to a voter who brings them in for himself.

## THE VOTING PROCESS

712. (a) A voter shall sign an application for ballot, indicate the primary he desires to vote in, if any, and present it to a registrar. The registrar shall compare the signature and information on the application with the signature and information on the duplicate permanent registration record. If, upon comparison of the signature and other identification, it is found that the applicant is entitled to vote, the registrar shall sign his initials on the application and shall note on the reverse side of the voter's duplicate permanent registration record the date of the election, the

number of the voter's ballot application, and the elections in which he votes. If the applicant's signature is illegible, the registrar shall print the name on the application. The registrar shall give the voter the ballot application which is the voter's identification for a paper ballot or ballots or for admission to a voting machine. The voter shall then sign the duplicate poll lists without leaving any lines blank on any poll list sheet.

If the identity of the applicant does not compare with the permanent registration records or he otherwise appears ineligible to vote, the registrar shall tell the applicant he is not eligible to vote. If the applicant still claims that he is eligible, the [p. 92] registrar shall challenge the voter and act thereafter on the decision of the judges. The applications for ballots of those persons whose votes are rejected shall be filed in numerical order.

(b) If a voter is so disabled that he cannot write his signature or make his mark, the register shall write his name for him where needed and shall indicate that he has done so by putting his initials immediately after the name.

Derivation

T.C.A. 2-315 and 1222.

Cross-References

Application for ballot form, see §522(b).
Challenge of voter, see §§723-726.

Comment

This is substantially the present procedure except that the ballot application serves under this section as both application and in place of the old ballot ticket. If the registrar finds the voter ineligible and the voter



insists on voting, the registrar challenges the voter and abides by the decision of the judges.

Consistent with the focus of this Chapter on accurate records the applications of rejected voters are preserved separately by the registrars.

Under the present law the clerks keep the poll lists. Since the clerks are eliminated under this draft, each registrar will have a poll list to be signed by the voter. The carbonized poll lists mean the voter will only need to sign once so that the process will not be impeded. The poll lists will also have the new benefit of paralleling the breakdown of the duplicate permanent registration records.

713. When the voter is to vote by voting machine, he shall then present his ballot application to the machine operator, enter the machine, and vote by marking the ballot and operating the machine. The machine operator shall file the ballot applications in order of presentation and shall permit the voter to operate the machine for those elections in which he is entitled to vote. The machine operator shall, upon demand of any voter before he enters the machine, tell the voter the order of the offices on the ballot and fully instruct the voter on how to operate the machine.

Derivation

T.C.A. 2-1519

Comment

The machine operator preserves the ballot applications as presented to him under this section. Otherwise this follows present law.

714. (a) When the voter is to vote by paper ballot, he shall then present his ballot application to the judge who is in charge of [p. 93] paper ballots. The judge shall write the

ballot number of each ballot the voter is entitled to on the ballot application, give the ballot or ballots to the voter, and give the ballot application to the judge who is assigned to deposit ballots in the ballot box. The judge shall, upon demand of any voter at the time his ballot is handed to him, tell the voter the order of the offices on the ballot.

(b) The voter shall then go to one of the voting compartments and shall prepare his ballot by making in the appropriate place a cross (x) or other mark opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided and making a cross (x) or other mark opposite it, and by making a cross (x) or other mark opposite the answer he desires to give on each question. Before leaving the voting compartment, the voter shall fold his ballot so that his votes cannot be seen but so that the information printed on the back of the ballot and the numbered stub are plainly visible.

(c) The voter shall state his name and present his folded ballot to the judge assigned to receive and deposit the ballots. The judge shall compare the ballot number on the stub with the ballot number on the voter's ballot application. If the ballot numbers are the same, the judge shall tear off and destroy the stub and deposit the ballot in the ballot box unless the voter is successfully challenged. The judge shall file all ballot applications in the order in which they are given to him.

Derivation

T.C.A. 2-1216, 1218, 1219, 1220, 1221, 1223, 1307, 1308, 1316, and 1533.



Comment

This procedure is simplified from the present law but is along the same lines. The responsibility for paper ballots is given entirely to the judges. The procedure parallels and is compatible with the use of voting machines. The procedure will be used for paper ballots both with and without voting machines.

715. (a) A voter may vote only in the precinct where he resides and is registered, but if a registered voter has, within ninety (90) days before an election, changed his residence to another [p. 94] place inside Tennessee but outside the precinct where he is registered or changed his name by marriage or otherwise, he way vote in the polling place where he is registered.

(b) A registered voter is entitled to vote in a primary election for offices for which he is qualified to vote at the polling place where he is registered

(1) If he is a bona fide member of and affiliated with the political party in whose primary he seeks to vote, or

(2) If, at the time the seeks to vote, he declares his allegiance to the political party in whose primary he seeks to vote and states that he intends to affiliate with that party.

He shall indicate on which basis he is voting in his application for a ballot.

Derivation

T.C.A. 2-202, 203, 204, 304, 815 and 816.

Comment

T.C.A 2-203 also authorizes judges and participants in judicial proceedings, certain candidates, and rural mail carriers to vote where they are on election day. These

authorizations have been deleted as obsolete. They are of questionable validity in any event to the extent that they authorize voting where a person is not a resident.

Subsection (b) is from present law except for the requirement that the voter indicate the basis of his voting in the primary. The application form in primaries will be easily marked with no significant increase in time taken to complete it. The present law, while requiring party membership under T.C.A. 2-816, provides no way for the voter to show it unless he is challenged. This draft preserves the open primary.

716. A voter who declares that by reason of blindness or other physical disability or illiteracy he is unable to mark his ballot to cast his vote as he wishes and who, in the judgment of the Officer of Elections, is so disabled or illiterate, may:

(a) Where voting machines are used,

(1) Use a paper ballot, or

(2) If he cannot mark a paper ballot as he wishes, have his ballot marked on a voting machine by his spouse, father, mother, brother, sister, son or daughter or by one of the judges of his choice in the presence of either a judge of a different political party, or, if [p. 95] such judge is not available, an election official of a different political party; or

(b) Where voting machines are not used, have his ballot marked by his spouse, father, mother, brother, sister, son or daughter or by one of the judges of his choice in the presence of either a judge of a different political party or, if such judge is not available, an election official of a different political party.



The Officer of Elections shall keep a record of each such declaration, including the name of the voter and of the person marking the ballot and, if marked by a judge, the name of the judge or other official in whose presence the ballot was marked. The record shall be certified and kept with the poll books on forms to be provided by the Coordinator of Elections.

Derivation

T.C.A. 2-1226 and 1519.

Comment

The present law authorizes assistance for disabled and blind voters. This section adds authorization for assistance to illiterates which is now required by federal statute and case law.

To protect the secrecy of the ballot voters are required to vote paper ballots instead of machines if they can use the paper ballots but not voting machines.

To assure that the ballot is marked as the voter wishes and safeguard against fraud the procedure forgiving assistance is changed. Under present law the voter can choose "any reputable person" or the Officer of Elections. This section, to inhibit coercive tactics, restricts the choice to members of the voter's family or to a judge. If a member of the family is chosen, he and the voter alone mark the ballot. If a judge is chosen, a judge of a different political party is present to assure the proper marking of the ballot.

A record must be kept of all assistance to discourage the giving of improper assistance.

717. Where voting machines are used, any voter desiring to cast a ballot for a candidate whose name is not on the voting machine ballot may request a paper ballot to be furnished him by the ballot judge. This request must be

made before operating a voting machine, and a voter after receiving a paper ballot may not enter a voting machine.

Derivation

T.C.A. 2-1207

Comment

This continues present law except that this section permits a voter to obtain a write-in ballot after entering the voting machine if he has not operated the machine. There is no legitimate reason to exclude such a voter from the use of the paper ballot.

[p. 96] 718. No voter who is voting without assistance may remain in a voting machine booth more than two (2) minutes or occupy a voting compartment more than five (5) minutes if other voters are waiting or more than ten (10) minutes in any event. If a voter refuses to leave after his time elapses, the Officer of Elections shall have him removed.

Derivation

T.C.A. 2-1223 and 1520

Comment

Present law.

719. If a voting machine being used in an election becomes out of order, it shall be repaired if possible or another machine substituted as promptly as possible. If repair or substitution cannot be made and other machines at the polling place cannot handle the voters, the paper ballots provided for the poliing place shall be used and, if necessary, ballots shall be provided under section 708.

If a voting machine becomes out of order while it is being used, the crosses (x) shall be cleared from its face



by the names of candidates and by questions. The voter may then vote on another machine or by paper ballot as the judges decide.

Derivation

T.C.A. 2-1522.

Cross-References

Large ballots on two machines, see § 512(c).

Comment

This section adds a procedure to be used if the voting machine breaks down. Generally repairs are to be made. Where there are not enough machines left, paper ballots are to be used. Where the ballot is spread on two machines under section 512(c), the voters will have to be shifted, from both machines to paper ballots if there are only two machines, to preclude double voting for a part of the candidates.

The second paragraph creates a procedure for a common situation, breakdown of an occupied machine, which the present law does not provide for. The judges decide which method the voter will use to enable them to deal with a situation where they are of the opinion that the voter may be deliberately jamming machines.

720. If any voter spoils a paper ballot, he may obtain others, one at a time, not exceeding three (3) in all, upon returning each spoiled one. The spoiled ballots shall be placed in an envelope marked "Spoiled Ballots."

[p. 97] Derivation

T.C.A. 2-1225

Comment

Present law with the addition of preservation of spoiled ballots to prevent fraudulent chain voting.

721. No person may take any ballot from the polling place before the close of the polls. If a voter refuses to give his paper ballot to the judge to be deposited in the ballot box after marking it, the Officer of Elections shall require that the ballot be surrendered to him and shall deposit it in a sealed envelope marked "Rejected" with his name, the reason for rejection, and the Officer's signature.

Derivation

T.C.A. 2-814 and 1225.

Comment

Present law in substance except that the ballot is to be rejected and preserved instead of destroying it.

722. The voting machine operator shall inspect the face of the machine after every voter has voted to ascertain that the ballot labels are in their proper places and that the machine has not been injured or tampered with. He shall remove any campaign literature left in the machine booth. During the election the door or other compartment of the machine may not be unlocked or opened or the counters exposed except by the custodian or other authorized person, a statement of which shall be made and signed by the custodian or authorized person and attached to the returns.

Derivation

T.C.A. 2-1518.

Comment

Present law with the addition of the requirement that the machine operator remove campaign literature from the machine.



723. If any person's right to vote is challenged by any other person present at the polling place, the judges shall present the challenge to the person and decide the challenge after administering the following oath to the challenged voter: "I swear (affirm) that I will give true answers to questions asked about my right to vote [p. 98] in the election I have applied to vote in." If the person refuses to take the oath, he may not vote.

Derivation

T.C.A. 2-1309

Comment

Present law authorizes the judges to decide challenges. This section makes clear that the judges alone handle challenges, and no one else is authorized to interfere directly with the voter. Others must present their challenges to the judges.

724. A person offering to vote may be challenged only on the following grounds:

(a) That he is not a registered voter at the polling place.

(b) That he is not the registered voter under whose name he has applied to vote.

(c) That he has already voted in the election.

(d) That he has become ineligible to vote in the election being conducted at the polling place since he registered.

The judges may ask any question which is material to deciding the challenge and may put under oath and ask questions of such persons as they deem necessary to their decision. The judges shall ask the registrar-at-large to check the original permanent registration records if the

voter claims to be registered but has no duplicate permanent registration record.

Derivation

T.C.A. 2-1310 and 1312; Cal. Elections Code § 14240.

Comment

This is substantially the present law except that it bars a redetermination of the voter's eligibility to register. Since the purpose of the registration is to determine in advance whether a person is a qualified voter, that determination is not open on election day except with respect to matters arising after registration. Other grounds for challenge are enumerated. T.C.A. §§ 2-1313 through 1315 dealing with naturalized voters are deleted as obsolete. The decision on a naturalized voter is to be made when he registers.

725. If the judges determine unanimously that the person is not entitled to vote, he shall vote by paper ballot and his ballot shall be deposited in a sealed envelope marked "Rejected" with his name, the reason for rejection, and the signatures of the judges written on it. If the judges do not agree unanimously to rejection, the person shall be permitted to vote as if unchallenged. In either case the challenge and outcome shall be [p. 99] noted on the back of the voter's duplicate permanent registration record and on the poll lists.

Derivation

T.C.A. 2-1311

Comment

This section requires unanimity among the judges to reject a voter whereas a majority can do so under the present law. This section provides a procedure for preserving rejected ballots so that they are available if there



is an election contest. The present law has no such procedure since the voter is not permitted to vote at all. The record of the challenge can be the basis for an investigation by the County Election Commission into any reports of improprieties in the election, including claims that persons voted who were not qualified to do so.

726. A person offering to vote in a primary may also be challenged on the ground that he is not qualified under section 715(b). Such a challenge shall be disposed of under the procedure of sections 723 through 725 by the judge or judges and the other election officials of the party in whose primary the voter applied to vote to a total of three to decide the challenge.

Comment

This new section requires that a challenge on the basis that the voter is not eligible under section 715(b) on party membership be decided only by election officials who are members of the party having the primary election.

727. At the time set for the closing of the polling place the Officer of Elections shall place one of the election officials at the end of the line of persons waiting to vote. No other person may then get in line to vote. The polls shall be closed as soon as all persons in the line ahead of the election official have voted regardless of when the polls opened.

Derivation

T.C.A. 2-1301

Comment

This is substantially the present law with the addition of what is now the practice in some places, that is, using an election official to close off the end of the line of persons eligible to vote.

## DUTIES AFTER CLOSING THE POLLS

728. The registrars shall, immediately after the polls close, cross (x) out the remaining space on incomplete poll list sheets so that no additional names can be written in and shall number those sheets serially and place them in the poll book binders.

[p. 100] Derivation

T.C.A. 2-1321

Comment

The present law requires marking out blank spaces. This section adds numbering of the pages to prevent addition of names.

729. Immediately after the polls close and before any ballot box or voting machine is opened to count votes, the judges shall tear all unused paper ballots in half without tearing off the numbered stubs. The portion without the stubs may then be discarded, and the portion with the stubs shall be preserved.

Derivation

New Mexico Stat. Ann. § 3-12-48 (1969).

Comment

This new section is intended to preclude misuse of unvoted ballots and to preserve a record of their disposition.

730. The judges shall then lock and seal the voting machines against voting. The judges shall sign a certificate on the tally sheets that each machine has been locked against voting and sealed; the number of voters as shown on the public counters; the numbers on the seals; and the numbers registered on the protective counters. The



judges shall then open the counter compartment in the presence of the watchers and all other persons who are present, giving full view of all the counter numbers. One of the judges, under the scrutiny of a judge of a different political party, in the order of the officers as their titles are arranged on the machine, shall read aloud in distinct tones the designating number and letter, if any, on each counter for each candidate's name and the result as shown by the counter numbers. He shall in the same manner announce the vote on each question. The counters shall not in the case of presidential electors be read consecutively along the party row or column, but shall always be read along the office columns or rows, completing the canvass for each office. The total shown beside the words "Electors for (giving the name) candidate for President and for (giving the name) candidate for Vice-President" shall operate as a vote for all the candidates for presidential electors for those candidates for President and Vice-President. The vote as registered shall be entered on the duplicate tally sheets in ink by the precinct registrars in the same [p. 101] order on the space which has the same designating number and letter, if any. The minority party precinct registrar shall then read aloud the figures from the tally sheet filled in by the majority party precinct registrar for verification by the minority party judge. After proclamation of the vote on the voting machines, ample opportunity shall be given to any person present to compare the results so announced with the counter dials of the machine. The judges shall make corrections.

Derivation

T.C.A. 2-1523 and 1525

Cross-References

Sealing the voting machine keys, see § 734.

Comment

This is the present law except for some changes in the officials, and the procedure of having the minority party registrar read off the figures to be verified by the minority party judge. This change should avoid clerical errors and minority party fears of misconduct.

731. After the requirements of section 730 have been met or, where voting machines are not used, after the polling place closes, the judges shall open the ballot box in the polling place in the presence of the watchers and all other persons who are present. The judges shall alternate in drawing ballots from the box and reading aloud within sight of the other judges the names of the persons who have been voted for on each ballot, and the two precinct registrars shall record the votes at the same time for counting on record sheets. The completed record sheets shall be bound in the poll books. Two (2) judges of different political parties shall then compute the votes for each candidate and each position on a question and shall enter the totals for the paper ballots on the duplicate tally sheets in ink. The third judge shall verify the computation and entry of the totals. The paper ballot vote totals shall then be announced.

Derivation

T.C.A. 2-1317, 1318, and 1523.

Comment

This procedure parallels the voting machine procedure and is more detailed than the present law. The record sheets are new. It is made clear that the ballot box



is to be opened and the votes are to be counted in the polling place.

[p. 102] 732. The duplicate tally shall then be completed, showing the total number of votes cast for each office and question, the total number of votes cast for each candidate, including write-in candidates, and for each position on a question. The duplicate tally sheets shall be certified correct and signed by each judge and by the Officer of Elections and shall be placed in the poll books. A final proclamation shall then be made as to the total vote received by each candidate and for each position on questions.

Derivation

T.C.A. 2-1523 and 1525.

Comment

This is drawn substantially from the present law except that where the present law refers to "statement of canvass" this draft uses "tally sheet" and this draft requires duplicates instead of triplicates.

733. (a) Only ballots provided in accordance with this Title may be counted. The judges shall write "Void" on others and sign them.

(b) If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled or on a question, his ballot shall not be counted for such office and shall be marked "Uncounted" beside the office and be signed by the judges. It shall be counted so far as it is properly marked or so far as it is possible to determine the voter's choice.

(c) If the voter marks his ballot for an office for a dead person, his ballot for that office shall not be counted and shall be marked "Uncounted" beside the office and signed by the judges.

(d) If two (2) ballots are rolled up together or are folded together, they shall not be counted. The judges shall write on them "void" and, the reason and sign them.

(e) Any ballot marked by the voter for identification shall not be counted. The judges shall write on it "Void" and the reason and sign it.

(f) Ballots which are not counted shall be kept together and shall be bundled separately from the ballots which are counted.

[p. 103] Derivation

T.C.A. 2-1227, 1228 and 1319.

Comment

This is essentially the present law on the counting of paper ballots. Such problems do not arise with the voting machines. The preservation of void bal'ots is to assure the preservation of all marked ballots.

Subsection (c) is new and gives effect to the decision to remove dead candidates from the ballot under section 509 but it goes further and precludes write-ins for dead persons. There is no parallel section for voting machines, because the only machine counters recorded are those on the machine ballot.

734. After the tally sheets have been certified, the judges shall close and lock the voting machines and enclose the keys for each voting machine in a separate sealed envelope on which they shall certify the number of the machine, the polling place where it has been used, the



number on the seal, and the numbers registered on the public and protective counters.

Derivation.

T.C.A. 2-1527

Comment

The only change here from present law is that the machines are closed and locked and the keys sealed up after completion of the tally sheets instead of before as now required. Locking against voting is covered by section 730.

735. The Officer of Elections shall prepare and certify to the County Election Commission a list of all election officials who served at the polling place and their official position. The list shall be signed by each official.

The Officer of Elections shall certify to the County Election Commission the names of those persons appointed as officials for the polling place before the election who failed to appear and discharge the duties of office.

Derivation.

T.C.A. 2-1107 and 1117.

Cross-References

Officials who cannot serve, §§ 1217 and 410.

Comment

The present law is continued with the addition of the requirement that the election officials sign the list for their polling place.

The second paragraph in conjunction with sections 1217 and 410 makes it clear that the officials who are to be reported are those who in fact were obligated to serve on election day. A person who notifies the Commission

before election day that he cannot serve does not have to. The Commission is to appoint a replacement.

736. When the certification of the tally sheets is complete, the Officer of Elections shall publicly announce the results and [p. 104] shall, on demand of any candidate or watcher present, furnish him a certified copy of the results. The certificate shall include the names of all candidates appearing on the ballot, the number of votes received by each and the number of votes for and against each question, including separately the total number of votes cast for each by voting machine and by paper ballot. The certificate shall be signed by the Officer of Elections and the judges and may be used as competent evidence in case of a contest regardless of what tribunal is hearing the contest.

Derivation

T.C.A. 2-813 and 1531.

Comment

This continues the present law generally but restricts the duty of giving certificates of results to providing them for candidates and poll watchers.

737. After certification of the completed tally sheets and the performance of the other duties of this Chapter, the Officer of Elections shall have the following items placed in the ballot box or boxes which shall then be locked:

(a) the bound bundles of paper ballots;

(b) the record of voter assistance;

(c) the envelopes containing spoiled ballots;

(d) the envelopes containing rejected ballots;

(e) the poll books;



(f) the bound applications for ballots;

(g) the portions of unused paper ballots containing the numbered stubs;

(h) the envelopes containing the voting machine keys;

(i) the duplicate permanent registration records; and

(j) the ballot box keys.

Derivation

T.C.A. 2-1426; New Mexico Stat. Ann. §§ 3-12-54 and 3-12-55 (1969).

Comment

This is substantially new, though it probably reflects common practice.

738. The Officer of Elections, accompanied by either a judge or precinct registrar of another political party, shall immediately deliver the locked ballot box or boxes and remaining election [p. 105] supplies or equipment except the voting machines to the County Election Commission.

Derivation

T.C.A. 2-407, 1401, 1402 and 1525.

Comment

Present law sets the deadline for delivering the returns at noon on the Monday after the election. There is no need now for such a late deadline, and the practice is to turn them in immediately after the election. The requirement that the officer be accompanied by a judge or registrar of a different party is to forestall suspicion of misconduct by the Officer of Elections.

739. No election supplies, ballots or equipment may be removed from a polling place from the opening of the

polls until the requirements of section 737 have been met except that items which have been delivered to the wrong polling place may be transferred to the correct one.

Derivation

T.C.A. 2-1320

Comment

This continues the present prohibition on removal of ballot boxes and extends it to all election equipment and supplies. It also authorizes a common sense exception for mis-delivered things such as voting machines or registration books.

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STATE OF TENNESSEE

# SPECIAL REPORT
of
LAW REVISION COMMISSION
to
EIGHTY-SEVENTH GENERAL ASSEMBLY
concerning
A BILL TO ADOPT AN
ELECTIONS ACT
containing a
UNIFIED AND COHERENT TREATMENT
OF ALL ELECTIONS

Richard H. Allen
Leo J. Buchignani
Oris D. Hyder
Sam D. Kennedy
H. H. McCampbell, Jr.
Allen Shoffner
Carlos C. Smith
Charlie H. Walker
Charles A. Trost, Chairman

Grayfred B. Gray
Executive Director

January, 1972

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SENATE JOINT RESOLUTION NO. 92

By Baker (Sullivan)

A RESOLUTION to propose that the Law Revision Commission make a study of the election laws of Tennessee.

WHEREAS, The election laws of Tennessee have not been completely revised in a great many years; and

WHEREAS, Many amendments to the original laws have been made and many sections of the laws repealed; and

WHEREAS, Many circumstances have developed causing different and complex problems requiring election officers throughout the state to request legal opinions from State Officials; and

WHEREAS, It is the consensus of this Assembly that such a revision to re-state, supplement, consolidate, clarify, repeal and revise the general election laws would result in a more clear, concise, understandable and usable set of laws to govern the administration of elections; now

THEREFORE, BE IT FURTHER RESOLVED BY THE SENATE OF THE EIGHTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES CONCURRING, That this Resolution be presented to the Law Revision Commission for

their study and that they submit their report to the next General Assembly.

ADOPTED: February 20, 1970

Frank C. Gorrell,
SPEAKER OF THE SENATE

William L. Jenkins,
SPEAKER OF THE HOUSE OF REPRESENTATIVES

APPROVED: February 27, 1970

Buford Ellington,
GOVERNOR



[p. 1] SUMMARY OF WORK DONE IN PREPARATION
for the
RECOMMENDATIONS OF THE COMMISSION

The Commission began its study of the election laws in 1970 by soliciting comments and suggestions from approximately 1500 Tennesseans and organizations having an interest in the election processes. It further reviewed the reports of official bodies which had previously studied Tennessee's election laws.

Due to the complexity of the existing law and its internal conflicts and inconsistencies, the Commission had its draftsman, Grayfred B. Gray, Esq., prepare a work document as a restatement of the existing law using simplified language and functional organization. The Work Document of April 1971 was widely distributed for comment and criticism. Copies went to all members of the 87th General Assembly and every County Election Commission.

Early in 1971 the Commission invited the political parties and other organizations to name representatives to work with the Commission in its study of election problems and in the development of its recommendations to the General Assembly. All three political parties and seven other organizations appointed such representatives. After the appointment each representative received copies of all materials considered by the Commission. Meetings of the [p. 2] Commission were open to participation by the representatives except for two meetings held for the purpose of instructing the Commission's draftsman. The latter meetings were open to the representatives as observers.

The following is a summary of the various steps taken in developing the recommendations:

1. Memoranda were prepared on a number of legal and practical problems in the election process.

2. Statutes from other states were examined and used where compatible with the basic system in Tennessee.

3. A policy memorandum was prepared listing major policy decision with the implications of various alternative decisions.

4. On the basis of these studies and the numerous suggestions which had been sent to the Commission, the Commission made tentative policy decisions and had drafts prepared.

5. Numerous drafts of various parts of the election laws were prepared, distributed to interested parties, and considered by the Commission.

6. The Commission's draftsman and the State Coordinator of Elections, Honorable Shirley Hassler, went to South Carolina to examine its system of computer registration and reported their findings to the Commission.

7. The Commission's draftsman attended the meetings during 1970 and 1971 of the Tennessee Association of County [p. 3] Election Commissioners to discuss election problems and various proposed solutions in the light of the Election Commissioner's first-hand experience.

8. In September of 1971 the Commission held one day public hearings on the election laws in Knoxville, Nashville and Memphis,



9. In October of 1971 a Tentative Draft of Title 2 was distributed for comment and consideration. It did not include criminal penalties.

10. A survey was made of sections of the Code outside Title 2 which would be affected by the Tentative Draft and amendments were prepared.

11. Drafts of alternative provisions were prepared where there appeared to be disagreement among interested parties and on highly political issues.

12. In addition to the public hearings the Commission met to consider the election laws study seven times during 1971.

13. Section by section comments were prepared, showing the source or sources of each section, relevant Tennessee statutory and constitutional citations, and a brief explanation of purpose and of changes in the section from the present law. The comments are in this report with the Act.

The Commission believes that the proposed Act is based upon thorough research, has been carefully drafted, and has [p. 4] been reviewed by a representative number of those persons most interested in its provisions.

## [p. 5] SUMMARY OF CONCLUSIONS AS TO INADEQUACIES OF EXISTING ELECTION LAWS AND THE NEED FOR ENACTMENT OF A REVISED ELECTIONS ACT

To appreciate fully the need for election law revision it is necessary to be aware of the development and nature of the current laws.

Codified in 1858 and amended at many successive sessions of the General Assembly, the laws have been an attempt to serve the needs of the electorate, the candidates, and the political parties.

Under the early statutes, all polling places used paper ballots. Having many polling places was essential so that people would be within walking distance of the polls. Communications were limited, and candidates travelled around their districts on horseback or by buggy talking with people on the farms and in the general store.

Though the statutes were amended and changed only infrequently up to the latter part of the 19th century, from the mid-20th century on the statutes have been amended and changed in almost every session of the General Assembly in an effort to met modern-day demands. From a 36-page booklet in 1890 the election code has grown to a 242 page Election Laws Manual, plus 72 pages in the 1970 supplement to the Code.

[p. 6] Necessity has brought about many of the changes. The desire to use voting machines added a new chapter to the election law in 1937. By 1959 the cumbersome code, plus the ever-increasing complexity of the election system and the recommendation of the Legislative Council Committee, caused the legislature to create the position of Coordinator of Elections. Since 1959, innumerable amendments have been enacted to remove conflicts in the statutes, to clarify them, and to attempt to update them.

Twenty-four years ago in 1947 an Election Commission was created by the General Assembly to study the election laws. The Commission reported that:



> The fact that election law bills are submitted at practically every session of the legislature indicates an unsatisfactory situation. Every one of these proposed laws is intended to correct an existing evil. In the past 100 years Tennessee Election laws have been changed in this piecemeal fashion. As a result we have a multiplicity of election laws with many conflicts and much uncertainty . . . [1]

The Commission concluded that:

> . . . the elimination of these irregularities will not be found in making the election laws more complex by the adding of additional details, but rather in a simplification of the laws, to be obtained by complete revision.[2]

In 1957 the General Assembly again became concerned with the complexity of election laws and asked the [p. 7] Legislative Council to conduct a study. The Council's conclusions bore marked similarities to those of the 1948 Commission:

> A great many existing errors and conflicts, though in need of correction, could await a comprehensive revision of the election laws, should . . . arrangements . . . be made for such revision by the legislature.[3]

By 1965 dissatisfaction with the condition of election laws was again expressed by the legislature when it empowered the Legislative Council to restudy the laws to provide still greater progress in modernizing them.

The Legislative Council Committee recognized the continuation of past problems and specifically noted the lack of a "central authority in Tennessee which can promulgate rules and regulations, or issue instructions to be followed by local election boards, or to compel the boards

to obey the law. No central election authority is given power to investigate irregularities in the administration of the election laws or to investigate charges of frauds."[4]

Though the position of Coordinator of Elections was created and filled in 1959, the statutes provided an advisory rather than a supervisory position. Therefore, there continued to be "the lack of uniformity caused by differing interpretations of the law."[5]

The Law Revision Commission viewed the 1970 mandate in Senate Joint Resolution No. 92 to "make a study of the election laws of Tennessee" in the light of the three pre-[p. 8]vious studies conducted at the request of the legislature. The joint resolution specifically points out that the election laws have not been completely revised in a great many years and charges the Commission to "restate, supplement, consolidate, clarify, repeal and review" the laws so as to "result in a more clear, concise, understandable and usable set of laws."

One of the more glaring deficiencies in the election laws now is that it is difficult to find what one needs in it. Materials governing the conduct of elections at the polling places, for instance, are found in no less than seven chapters of the twenty-two chapters which make up Title 2.

There are also numerous practical inadequacies. For example, the political parties' Primary Boards are to be appointed on the first Monday in May of even number years from lists furnished by candidates who have qualified for the August elections. The deadline for filing for the August elections is the first Thursday in June.



The cost of elections if they were carried out as the law now contemplates would be prohibitive. For the biennial August elections each party having a primary is to have its own set of officers and there is to be a set of officers for the general election at the same time.

Terms are used with varying meanings which make it difficult for lawyer and layman alike to understand what the law actually requires of them. For example, the word [p. 9] "officer" is used to refer to the officer of elections, the officer to whom election returns are to be delivered and in places to refer to judges. The term "inspector" is used apparently to mean poll watcher, but he is given the authority of a peace officer which it appears clear no poll watcher is meant to have.

The Coordinator of Elections, an office which is "to coordinate election activities throughout the state," to interpret questions of law for county election officials, to "arrange for the training of new election officials with a view toward uniformity of election procedures throughout the state," to keep the election laws manual up to date, to prepare condensed handbooks for election officials, and to suggest amendments to the election laws, is still only a part time position, although elections are being held in Tennessee practically year round.[6]

The deficiency which results from these and other problems is that much of the law appears to be commonly disregarded in the interests of having simple, fair and economical elections.

Finally, and perhaps most important, the citizens who have the responsibility for carrying out the law and the citizens for whose protection the law is written find it

very difficult to use the law as it is now written. In this area where laymen are commonly called on to know and understand the law, the law must be as nearly as possible in plain English.

## [p. 10] SUMMARY OF FEATURES OF THE PROPOSED BILL TO ADOPT A REVISED ELECTION ACT FOR TENNESSEE

The section-by-section comments which will be filed with the proposed election Act state the sources of each section, refer to the existing, statutory law in Tennessee on the subject, supply cross-references in the new Act where appropriate, and briefly explain the purpose of each section except for those which merely continue the present law.

The Law Revision Commission has made no attempt to depart from the general principles established in the current election code. It has, rather, attempted to simplify procedures and language in the light of current practices, while maintaining appropriate safeguards and providing a fair election system at a reasonable cost to the taxpayer.

The Act provides uniform rules for all elections conducted in the state. General procedures will be the same for primary and general elections, local elections and questions submitted to the people, and the procedures for all are in the same place.

Recognizing that political parties should ultimately control purely party questions, the proposed Act provides for that control purely party questions, the proposed Act provides for that control but still reduces the



number election officials and places the basic responsibility for holding [p. 11] primaries in the County Election Commission. The parties control who votes in their primaries, the determination of the winners, and primary election contests and may, if they wish, decide who runs in their primaries.

The proposed act provides a comprehensive set of definitions covering terms used throughout the act, thereby giving greater coherence to the act and making it easier to use.

The responsibilities of the Coordinator of Elections are enlarged to provide uniformity in both the conduct of elections and the maintenance of records, to permit the issuance of rules and regulations, and to vest the Coordinator with the authority to investigate or have investigated the administration of the election code. To insure that the Coordinator performs in a nonpartisan way, the State Election Commission is equally divided between the majority and minority parties and is given the power to appoint the Coordinator for a four year term and, in appropriate cases, to remove him.

The proposed Act contains provisions which make registration more accessible to voters but preserve the security of the registration system which is critical to honest elections. Mandatory supplemental registrations are reduced, but the Commission offices are to be open one Saturday a month and an annual precinct registration is required in counties of over 50,000 people.

[p. 12] The Commission believes that this annual precinct registration should meet the need for close to home registration which leads many people to ask for

mobile registration programs. In addition the authority of the County Election Commission in conducting registration is clarified.

Procedures and standards for purging registrations are clarified with adequate safeguards to permit purged voters to re-register if eligible.

Because of developments in federal constitutional law, it appears clear that permitting non-residents to vote in municipal elections is unconstitutional. On the other hand, if it is not unconstitutional, it opens the legal door to other classes of non-residents to vote, thereby risking turning control of municipalities in some instances over to non-residents. In either case, the Commission concluded that voting on property qualifications should not be permitted, and it is not under this Act.

Disfranchisement for infamous crimes under certain limitations is permitted by the Tennessee Constitution; however, it is virtually impossible to administer disfranchisement properly or equitably. Therefore, this Act does not disfranchise for criminal convictions, but people who are imprisoned are not permitted to vote.

Provision for uniformity, efficiency, and economy in the operation of polling places on election day is provided by [p. 13] establishing a minimum and maximum size for precincts, a ten-to-twelve hour voting period with a uniform closing time in multi-county elections, by eliminating clerks, by requiring the Officer of Elections to be responsible for the conduct of elections at his assigned polling place, and by requiring that general and primary elections on the same day be held at the same place and by the same officials for most matters. Trained, skillful



persons should be able to serve as polling place officials due to increased compensation which will probably cover the cost of serving as an official.

Numerous safeguards are included to preserve the purity of elections, such as use of serially numbered ballots, use of duplicate registration records in all elections, attendance at polling place of poll watchers from various groups, clarification of 100-foot boundary within which no campaign literature may be shown or distributed, assistance by either a family member or election officials of different political parties in voting by the blind, physically disabled or illiterate, the channeling of all challenges through election judges, and the required state-wide use of voting machines with sanctions for non-compliance.

The absentee voting provisions preserve all procedures necessary to safeguard the ballot while eliminating unnecessary procedures. Use of the absentee ballot is permitted to those who will be outside the county during the hours the polls are open on election day and to those who are sick or physically disabled or who expect to be hospitalized. During the [p. 14] absentee voting process there continue to be requirements for attesting officials, certificates of non-registration, and signature comparisons by both the registrar and the absentee ballot counting board.

The role of the County Election Commission as a ministerial body is clarified, providing resolution of disputes through the courts, with the Commission being represented by the office of the state Attorney-General.

The size of County Primary Boards is reduced to three members, because of the reduction of their duties. Since they are to be purely party officials with few duties, authorization for compensation is eliminated.

The Commission examined the election laws in the light of rapidly developing technology available for use in elections. The proposed Act would permit the experimental use of new voting machines under rigorous safeguards so that future General Assemblies could have the benefit of Tennessee experience in considering further changes in the voting machine law.

The procedure for election contests has been simplified, and most are to be tried in the chancery courts. A procedure is provided for expeditious decision of any contest of the election of presidential electors. To discourage malicious or frivolous contests, the Act provides that costs and reasonable attorneys fees are to be assessed in malicious or frivolous contests.

[p. 15] The law on election expenditures is largely unchanged except for requiring the naming of persons who contribute or receive $100 or more in a campaign. The present criminal sanction is replaced by a ban on being a candidate for six years after the election. Uniform report forms are also to be provided.

Presidential electors are bound to vote for their party's candidates with certain exceptions.

The law on contests of the election of Governor is practically unchanged except for permitting the candidate who prevails on the face of the returns to withhold



his objections unless the contestant raises objections sufficient to change the result of the election.

Provisions of the existing Code which would be repealed by this Act are specifically repealed, and many provisions outside Title 2 are amended to conform to the proposed Title 2.

While accurate figures have proven unobtainable, the Commission believes that the net effect of the proposed Act will be to reduce the cost of operation of the election system.

NOTE

Recognizing that some matters are highly political and that there is great debate on others, the Commission has had drafted alternative sections on these points.

[p. 16] These alternatives, with necessary changes in other parts of the proposed Act to implement each alternative, are printed in a Supplement. The alternatives are not recommended by the Commission but are included to show alternative language which is compatible with the proposed Act for the use of the members of the General Assembly.

[p. 17] SPECIAL RECOMMENDATION

In the course of its study the Commission examined the South Carolina system of providing a central computer registration file for the entire state. The Commission believes that such a system would be a distinct asset in Tennessee in keeping registration records accurate, in providing state support for a system which most counties

could not afford but could benefit from, and in maximizing the benefits which the State obtains from its computer systems.

The specifics of the system can best be developed in the light of the computer system available to the State, a matter which is now under study in the Department of Finance and Administration. In addition, setting up the system will apparently take some eighteen months.

The Commission recommends that the Coordinator of Elections be directed to develop, in conjunction with relevant state agencies, a plan for establishing a central computer registration system for Tennessee and to prepare any necessary amendatory legislation. The plan should be presented to the General Assembly in January of 1973 so that, if approved, it can be implemented in time for the 1974 biennial elections.

[p. 18] CONCLUSION

In the preparation of the proposed Act, the Commission has followed no doctrinaire theory. An effort has been made to consider carefully the practical effect of each provision. While the substance of many provisions of existing Tennessee law has been retained, where improvements in either substance or language appeared desirable, we have attempted to make them.

This project would not have been possible without the assistance of Tennesseans from every part of the State and from all walks of life. We are particularly grateful to the people appointed to represent various organizations in the study. They were:



Representative Charlie Ashford, House Republicans

Al Barger, Esquire, Tennessee Association of County Election Commissioners

Julian Blackshear, Esquire, Tennessee Voters Council

Professor James Blumstein, American Civil Liberties Union of Tennessee

George R. Carr, Tennessee Association of County Election Commissioners

Lee Case, Tennessee State Labor Council

Representative Riley C. Darnell, House Democrats

Senator Bill Davis, Senate American Party

Andrew Dix, National Association for the Advancement of Colored People

Mrs. Richard J. Eskind, Federation of Democratic Women

[p. 19] Mrs. Walter Gobbel, Federation of Republican Women

S. Ralph Gordon, State Republican Executive Committee

Senator Douglas Henry, Jr., Senate Democrats

T. A. Hickman, Chairman, State American Party Executive Committee

Mrs. Lawrence Levine, Tennessee League of Women Voters

Todd Meacham, Esquire, State Republican Executive Committee

Bryan U. Melton, State American Party Executive Committee

Seth Norman, Esquire, State Democratic Executive Committee

Senator Daniel W. Oehmig, Senate Republicans

Mrs. James Tuck, Tennessee League of Women Voters

Horace V. Wells, Jr., Tennessee Press Association, Inc.

Many other Tennesseans have been helpful in this study. We wish to give a special word of thanks to Honorable Shirley Hassler, Coordinator of Elections, and Honorable Robert H. Roberts, Assistant Attorney General, for the assistance and suggestions they have given in the development of the proposed Act.

We believe that the proposed Act will be an aid to voters, to people who have to administer the election laws, and to political parties and candidates. There will be those who will be disappointed that the proposed Act is not a major piece of reform legislation. The Commission saw its job in this study, however, as simply improving the

(This following page, page 20, is a duplicate of previous page 19).

[p. 20] Mrs. Walter Gobbel, Federation of Republican Women

S. Ralph Gordon, State Republican Executive Committee

Senator Douglas Henry, Jr., Senate Democrats

T. A. Hickman, Chairman, State American Party Executive Committee



Mrs. Lawrence Levine, Tennessee League of Women Voters

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In 1970 the General Assembly directed this Commission to undertake this project. We have devoted to it our

best efforts. We trust that our recommendations will be of assistance to you and we hope that they will meet with your approval.

Richard H. Allen

Leo J. Buchignani

Oris D. Hyder

Sam D. Kennedy

H. H. McCampbell

Allen Shoffner

Carlos C. Smith

Charlie H. Walker

Charles A. Trost, Chairman

[p. 22] FOOTNOTES

1. Report of the Election Law Commission to the Seventy-sixth General Assembly of Tennessee, p. 8.
2. Ibid, p. 9.
3. Tennessee Legislative Council Committee, *1957-58 Final Report to the 80th General Assembly,* Nashville, 1958, p. 39.



4. Tennessee Legislative Council Committee, *Final Report, Study on Election Laws,* Nashville, 1966, p. 21.
5. Ibid., p. 27.
6. T.C.A. 2-110 and 2-111.